

**In the Matter of: Objections to Issuance of Solid Waste Facility Permit 46-09,
Great Lakes Transfer Station, La Porte County
2006 OEA 24 (05-S-J-3632; 05-S-J-3655)**

OFFICIAL SHORT CITATION NAME: When referring to 2006 OEA 24, cite this case as
Great Lakes Transfer Station SWFP, 2006 OEA 24.

TOPICS:

Motion for Summary Judgment	road weight limit
Motion to Dismiss	local zoning
solid waste transfer station	building permit
completed application	truck traffic
traffic	amend petition
dust	operation
emissions	real estate transaction
garbage	wetlands
noise	Environmental Strategic Justice Plan
odor	329 IAC 11-11-1
driveway permit	329 IAC 11-9-2
Road Access	Ind. Code § 13-15-3-5

PRESIDING JUDGE:

Dauidsen

PARTY REPRESENTATIVES:

Permittee: David Pippen, Esq., Amy Romig, Esq.
Petitioner: Town of Pines: Clay Patton, Esq.
Town of Beverly Shores: Clay Patton, Esq.
Porter County Board of Commissioners,
Board President Robert P. Harper,
Board Vice President John A Evans and
Board Secretary Carole M. Knoblock: Gwenn Rinkenberger, Esq.
Intervenor: Shaw Friedman, Esq.; Robert Wright, Esq.
IDEM: Julie Alexander, Esq.

ORDER ISSUED:

September 12, 2006

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

appealed: [Porter County Board of Commissioners v. Great Lakes Transfer LLC,](#)
49F12-0610-PL-044019 (Marion Super. Environ. 2007) **affirmed.**

STATE OF INDIANA) BEFORE THE INDIANA OFFICE OF
) SS:
COUNTY OF MARION) ENVIRONMENTAL ADJUDICATION

FINDINGS OF FACT, CONCLUSIONS OF LAW and FINAL ORDER
ON MOTION TO DISMISS and MOTION FOR SUMMARY JUDGMENT

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FINDINGS OF FACT

1. Great Lakes Transfer, LLC (“Great Lakes”) applied for a permit to operate a solid waste transfer station (“Transfer Station”) in La Porte County on August 2, 2004. The Transfer Station is located on County Line Road which abuts both La Porte and Porter Counties. The Transfer Station is located to the south of both the Town of Pines and the Town of Beverly Shores. Exhibit 1.²
2. Prior to issuing the Permit, IDEM conducted a public hearing on September 27, 2005 about the Permit application and the Transfer Station. IDEM solicited, received and considered comments that were submitted at the public meeting and in writing by the public. *See e.g.* Exhibit 20, Exhibit 23 (Responsiveness Summary).
3. Great Lakes responded to all requests that IDEM made for additional information while reviewing the application for the Permit. Great Lakes provided information not required by the rules governing transfer station permit applications, such as a wetlands delineations report. *See e.g.* Exhibits 4, 5, 7, 9, 11, 12, 13, 15, 16, 18, 19, 22, *See also* Affidavit of Sean Blieden attached to Great Lakes’ Motion to Dismiss or for Summary Judgment (“Blieden Aff.”), ¶4.
4. On November 9, 2005, the Indiana Department of Environmental Management (“IDEM”) issued Solid Waste Facility Permit 46-09 (“Permit”). Exhibit 23, Blieden Aff., ¶2.
5. The Town of Pines filed its appeal on November 23, 2005, the Town of Beverly Shores filed its appeal on November 28, 2005. The Porter County Board of Commissioners, Board President Robert P. Harper, Board Vice President John A. Evans and Board Secretary Carole M. Knoblock (collectively “Porter County”) filed their appeal on November 28, 2005, and La Porte County intervened on January 5, 2006.
6. The Town of Pines and the Town of Beverly Shores (collectively the “Towns”) have alleged that the Transfer Station will cause increased traffic near the Towns which are located to the North of the Transfer Station. Exhibit 27, ¶2³. They allege that the increased traffic will cause dust, emissions, garbage, noise and odors in the Towns. *Id.* The Towns further allege that the issuance of the Permit is contrary to IDEM’s Environmental Justice Strategic Plan. Exhibit 27, ¶5. During the Stay Hearing, the Towns raised additional allegations that wetlands near the Transfer Station may be impacted by the operation of the Transfer Station.

² Unless otherwise noted, Exhibits refer to Exhibits introduced at the Stay Hearing conducted on March 1 and 6, 2006.

³ The Towns asserted traffic and noise and dust and groundwater as their basis for an interest, but do not list any of these issues as “Issues Proposed for Consideration at Hearing.” Exhibit 27, ¶¶2, 5.

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7. Porter County has alleged that the Transfer Station Permit should not have been issued because it has not received a permit from Porter County to cut into County Line Road and because operation of the Transfer Station may require that trucks exceeding the posted weight limit will travel County Line Road. Exhibit 24, pp. 3, 6.
8. La Porte County alleged in its Petition to Intervene (granted on February 15, 2006) that the Transfer Station presented a safety hazard because of the heavy truck traffic in the area. Exhibit 28, ¶3. La Porte County raised additional allegations at the Stay Hearing that Great Lakes did not yet own the property on which it was proposing to build the Transfer Station and that the Building Permit was not issued to the owner of the property at the time the Building Permit was issued.
9. On January 12, 2006, this Court established a deadline of February 6, 2006 to amend petitions. No amendments which added issues for consideration were filed, either prior to or after February 6, 2006.
10. On April 10, 2006, IDEM moved for summary judgment on the grounds that there were no genuine issues of material fact and that this Court could affirm issuance of Great Lakes' permit. Great Lakes moved to dismiss the Petitions for failure to invoke this Court's jurisdiction or in the alternative for summary judgment that there were no genuine issues of material fact.
11. Petitioners and Intervenor filed a joint response to the dispositive motions on May 11, 2006, to which Great Lakes replied on June 19, 2006.
12. Petitioners and Intervenor did not otherwise file responses until Porter County filed a surreply on September 8, 2006, and Petitioners and Intervenor filed a joint surreply, per Court Order so permitting, raising issues not previously included in either their Petitions for Review or any other pleadings on September 11, 2006. New issues included whether or not a certified deed was included in the permit application, whether the current owners of the property were required to sign the permit application notwithstanding Great Lakes' intention to purchase the property prior to operation, and the inclusion of the name and address of the current owners in the permit application.
13. These issues were raised without any additional supporting evidence beyond that introduced at the Stay Hearing. Petitioners and Intervenor also discussed, for the first time since the Petitions for Review had been filed, IDEM's Environmental Justice Strategic Plan. The joint surreply filed on September 11, 2006 was served and filed via email, and not in accordance with the filing procedures set out in 315 IAC 1-3-3, or in the Court's September 8, 2006 Order, which provided that the surreplies, if any, were "to be served via email and via U.S. Mail." Although the court allows service of pleadings on other parties via electronic submission, the court has not waived the requirements set forth in 315 IAC 1-3-3 regarding filing formats.

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CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to IND. CODE §4-21.5-7-3.
2. This is an Order issued pursuant to IND. CODE § 4-21.5-3-4(e). Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.
3. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100, 104 (Ind. 1993). Findings of fact must be based on the evidence presented to the ELJ, and without deference to the agency’s initial factual determination *Id.*; IND. CODE §4-21.5-3-27(d) states the review standard:

Findings must be based exclusively upon the evidence of record in the proceeding and on matters officially noticed in that proceeding. Findings must be based upon the kind of evidence that is substantial and reliable. The administrative law judge’s experience, technical competence, and specialized knowledge may be used in evaluating evidence.
4. Petitioners and Intervenor are required to list with particularity the issues they propose for consideration before this forum. *De Novo* review does not provide an unlimited opportunity to continually raise new issues through out the proceedings. To the extent that Petitioners and Intervenor have raised new issues not included in their Petitions for Review, this Court is not required to consider these issues. Notwithstanding untimely issues raised late in the proceedings, this Court concludes that these untimely issues raised by Petitioners are not sufficient to deny the permit.
5. Petitioners and Intervenor have the burden of showing that a permit was issued contrary to law or is somehow deficient as a matter of law. *In the matter of Objection to the Issuance of Permit Approval No. IN 0061042 Aquasource Services and Technology*, 2002 IN ENV LEXIS 18 at *6 (In. Off. Env. Adj., December 18, 2002)(“*Aquasource*”)
6. The OEA may enter judgment for a party if it finds that “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to judgment as a matter of law.” IND. CODE §4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant. *Am. Family Ins. Co. v. Globe Am. Cas. Co.*, 774 N.E.2d 932, 935 (Ind. Ct. App. 2002); *In the Matter of Objection to the Denial of Excess Liability Trust Fund, Claim No. 200011504/FID #10539 Gas America # 40*, No. 01–F–J–2806, pp. 3–4, OEA (October 21, 2002).

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7. Petitioners and Intervenor have essentially complained of harms that will allegedly occur because of the operation of the Transfer Station and trucks entering and leaving County Line Road. Operational issues and traffic issues are not within the jurisdiction of the OEA, and present no genuine issue of material fact as to whether the moving parties, Great Lakes and IDEM, are entitled to judgment as a matter of law.
8. Petitioners and Intervenor have also complained that IDEM's Environmental Strategic Justice Plan will be violated by issuance of the permit because residents of the area will be disproportionately affected by pollution. Petitioners and Intervenor have presented no evidence indicating that indeed the issuance of the permit will result in pollution or other negative environmental impacts upon the local residents that might trigger any environmental justice issues. Speculation that the transfer station may lead to additional pollution is again an operational issue that is not within the jurisdiction of the OEA. Petitioners and Intervenor have likewise not presented any evidence demonstrating how the Environmental Strategic Justice Plan is incorporated into the permitting process. The regulations governing issuance of transfer station permits does not allow IDEM to deny a permit based solely upon environmental justice issues. The existence of disputed facts concerning compliance with or violation of the Environmental Strategic Justice Plan present no genuine issue of material fact as to whether the moving parties, Great Lakes and IDEM, are entitled to judgment as a matter of law.
9. While Petitioners have shown that their legal interest in enforcing road weight limits, local zoning and building permit regulations is aggrieved and adversely affected should Great Lakes' not comply with applicable regulations, including lack of a road-cut permit because if the alleged harm, i.e., the alleged inability to construct an access road because Great Lakes lacks a road cut permit, such condition will also prevent IDEM from allowing Great Lakes to operate if in fact that condition is true.
10. Petitioners claim that failure to demonstrate that Great Lakes had submitted a complete application as stated in 329 IAC 11-9-2 should result in overturning IDEM's decision to issue the permit. Petitioners allegations that Great Lakes' application was not complete included the following:
 - a. As Great Lakes had not obtained a driveway permit, it therefore lacked the requisite road access;
 - b. La Porte County's road access approval, as submitted with Great Lakes' application, was ineffective, as the specific road was subject to Porter County's jurisdiction, and not that of La Porte County;
 - c. Great Lakes provided land transfer information which did not comply with 329 IAC 11-9-2, and which had expired prior to submission to IDEM.

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11. 329 IAC 11-9-2 states that “a complete application for a solid waste processing facility permit must consist of the following information submitted to the commissioner”. The term “complete application” as used in 329 IAC 11-9-2 is not the initial submittal as challenged by Petitioners and Intervenor here. A complete application is an application that has all the required documents listed in 329 IAC 11-9-2 and therefore, may be deemed effective per 329 IAC 11-11-1-1. The Request for Additional Information commonly known as the RAI, was made after the initial submittal, which, under de novo review, may be considered by the Court.
12. 329 IAC 11-11-1-1(c) requires that the notice of the granting of a permit or the Notice of Approval must state that ***the permit will not become effective until***
 - (1) All financial responsibility documents have been executed and delivered to the commissioner in the form and amount specified; and
 - (2) any real estate transfers necessary to vest legal title of the real estate upon which the permitted activity is to occur in the name of the owner listed on the application have been completed, executed, and recorded and documents evidencing such transfer have been delivered to the commissioner.
13. As construed together, these rules anticipate that real estate transfers and land use authorizations may not have been finalized at the time of the Notice of Approval is issued. Therefore, at the time of the Notice of Approval final documents cannot be required and the Notice of Approval is not an illegal approval of a permit. A contrary interpretation would yield an absurd result. IDEM’s analysis can be completed more efficiently when a current owner, versus a prior owner, submits a deed at the time of the effective date to submit a deed. A prior owner would not be responsible or liable for pollution or damages to the environment from violations of the permit because the permit would be issued to the name on the application and that is the name required to be on the deed per 329 IAC 11-11-1-1(c). Petitioners and Intervenor have not cited to evidence supporting their alleged permit deficiencies in the permit application which would deny the issuance of the Great Lakes permit as a matter of law. 329 IAC 11-9-1 and 329 IAC 11-9-2 mandate the necessary information to be submitted with a permit application; 329 IAC 11-9-2 . However, some discretion is provided by 329 IAC 11-11-1 in allowing the commissioner to “determine[] that the application is complete.” Here, the commissioner determined that the application was complete by its issuance of the application. Petitioners and Intervenor have provided no evidence that IDEM was incorrect in determining that the application as complete when it was submitted to IDEM. 329 IAC 11-11-1 (c) further prohibits the permit from becoming effective until an applicant complies with specified conditions, including documentation of a completed real estate transaction. By its limitation on permit effectiveness pending proof of compliance, the terms of 329 IAC 11-11-1(c) provide further indication that applicants are afforded some flexibility in finalizing the land transfers and land usage authorizations needed to accomplish a permit’s terms. And, should such transactions require revision, depending upon the scope of revision, an approved permit modification would be required in advance of operation.

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14. IND. CODE § 13-15-3-5 recognizes a two phase process for permitting procedures.

Whenever a permit is required by any rule of one of the boards under IC 13-15-1 for the construction, installation, operation, or modification of any facility, equipment, or device, the permit may be issued only after the department staff has:

- (1) approved the plans and specifications; and
 - (2) determined that the facility, equipment or device meets the requirement of the rule.
15. Therefore, 329 IAC 11-9-2(h) only requires that Great Lakes submit an application that contains a plot plan that shows how the facility will have road access, i.e. how the facility will connect to local roads. The regulation does not require that Great Lakes must demonstrate that it has obtained all certifications and permits to access local roads. However, the lack of a permitted driveway will also prevent IDEM from allowing Great Lakes to operate if in fact that condition is true.
16. Porter County makes the corresponding undisputed allegation that overweight trucks from the operation of the Transfer Station will harm its roads. Porter County presented testimony that it has the sole and exclusive jurisdiction over the roadways in Porter County, including County Line Road. Testimony of Commissioner Harper, March 1, 2006, p. 60, l. 20. In addition, the Porter County Code specifically governs enforcement of violation of regulated weight limits of vehicles utilizing public rights-of-way in Porter County. Exhibit 32, admitted March 1, 2006, Porter County Code §§10.024.050, 10.024.060. This Court does not have the jurisdiction to consider traffic issues that are within the province of local municipalities. Both the jurisdiction to consider such traffic issues, and the enforcement power to enforce local regulations cannot be encroached upon by this Court, should operation of the Transfer Station in fact harm Porter County's roads.
17. La Porte County has raised analogous issues concerning the zoning and building permits issued to Great Lakes. La Porte County has since noted that Great Lakes' zoning or building permits status has changed. The La Porte County Plan Commission and Board of Zoning Appeals is vested with enforcing its own zoning and building issues, not this Court. IND. CODE §36-7-4 *et seq.* IDEM requested, and received proper documentation relating to the zoning and building permits for the site. Mansue Test., pp. 11-12. La Porte County has the jurisdiction to challenge the validity of the zoning or building permits, not this Court. The lack of appropriate zoning and/or building permits will also prevent IDEM from allowing Great Lakes to operate if in fact that condition is true.

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18. Petitioners and Intervenor have requested that this Court decide that IDEM erred in issuing the permit because circumstances later changed, including conveyance of real estate to Great Lakes, driveway permit, road access and zoning and building permits. Petitioners and Intervenor have cited no authority requiring IDEM to review its permitting decisions prior to determining whether the permit may be effective per 329 IAC 11-11-1(c). Public policy is not served by requiring IDEM to review every issued permit, prior to receiving notice that a facility intends to commence operations, for changed circumstances. Furthermore, this Court cannot decide that IDEM erred based upon evidence that was not before IDEM at the time. The permit does not allow or give Great Lakes authority or permission to ignore local rules or regulations, nor influence local decision-making bodies. This Court finds that changed circumstances after the permit has been approved provide an insufficient basis for denying the permit. And, should Great Lakes lack properly conveyed real estate, or lack the authority from appropriate agencies other than IDEM, then such deficiency will also prevent IDEM from allowing Great Lakes to operate if in fact such a condition is true.
19. Petitioners and Intervenor have also alleged that the current property owners are required to sign financial responsibility documents as part of the permit application. Statutory construction principals mandate that when determining the meaning of a regulation or statute that the court must look to the purpose of the statute as a whole. 329 IAC 10-9-2 requires that “the owner of the land upon which the facility *is located* also shall sign the application form acknowledging the land owner’s responsibility in accordance with 329 IAC 11-11-4.” (Emphasis added). The Court heard undisputed evidence that Great Lakes will purchase the property from the current owner prior to operation, in fact, is required to do so before IDEM will allow operations to commence. Despite having included an expired purchase option in its application to IDEM, at that point, Great Lakes will be the owner of the land upon which the facility is located, and as such Great Lakes signed the permit application. Looking at the purpose of the requirement for financial responsibility requires that the owner at the time of the operation is the correct entity to sign document relating to financial responsibility.
20. The Towns raised issues concerning the wetlands surrounding the Transfer Station. IDEM considered the potential for pollution when issuing the Permit. All waste processing is to occur within a building. Testimony of Lawrence Mansue, March 6, 2006 (“Mansue Test.”) p. 8, l. 8. The operation plan of the Transfer Station deals with liquid wastes that will be collected and will never reach potential wetlands. *Id.* at p. 17, ll. 4-18. IDEM considered the wetland delineation submitted by Great Lakes and determined that neither the construction nor the operation of the Transfer Station will impact wetlands. *Id.* at p. 18, ll. 3-8. Furthermore, the issuance of the Permit does not authorize Great Lakes to impact wetlands or to discharge pollutants into wetlands, and Great Lakes would be subject to an enforcement action by IDEM if it were to do so. *Id.* at p. 18, ll. 12-18. The Towns have introduced no evidence to rebut IDEM’s determination that the Transfer Station is not designed or will be operated in a manner that will impact wetlands in the area. Unsupported general concerns are not sufficient to establish that a party is aggrieved or adversely affected.

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21. IDEM must presume that any person that receives a permit will comply with the applicable regulations. The OEA will not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law. *In the Matter of: 327 Article 3 Construction Permit Application Plans and Specifications for Sidney Wastewater Treatment Plant and Sanitary Sewer System Permit Approval No. 16684*, 2004 IN. ENV. LEXIS 22 (Ind. Off. Env. Ajdud., November 5, 2004).
22. Petitioners' concerns seem to be with the damages that the proximity of the transfer station operations might have on nearby wetlands. These types of damages are not within the jurisdiction of the OEA, but rather should be brought in court of general jurisdiction such as a suit for damages or for injunctive relief. *See e.g. In the Matter of: Objection to the Issuance of Permit Approval No. 473-05 Mr. Perry Godlove, Godlove Enterprises, Inc.*, 2002 IN ENV LEXIS 14 (In. Off. Env. Adjud., Sept. 22, 2002)(“The Office of Environmental Adjudication is an administrative court of limited, statutory jurisdiction and is not endowed with equity jurisdiction.” *Id.* at *2); *In the Matter of Objections to the Denial of Extension of Reply Period and Denial of Operating Permit Renewal for the Mallard Lake Landfill*, 2004 IN ENV LEXIS 13 (In. Off. Env. Adjud., October 20, 2004)(“This Office does not have the statutory authority to grant such a request [request for damages]” *Id.* at *1.)
23. In order to demonstrate that they are likely to prevail on the merits, the Towns, Porter County, and La Porte County have the burden of showing that a permit was issued contrary to law or is somehow deficient as a matter of law. *In the matter of Objection to the Issuance of Permit Approval No. IN 0061042 Aquasource Services and Technology*, 2002 IN ENV LEXIS 18 at *6 (In. Off. Env. Adjud., December 18, 2002)(“*Aquasource*”).
24. Petitioners have raised no specific issues challenging the validity of IDEM's decision that Great Lake's permit application complies with applicable laws and rules. None of the issues raised by Petitioners and Intervenor address the permit's terms or regulatory requirements. Petitioners cannot show that the permit was deficient as a matter of law. Since Petitioners have not raised any issues relating to the approval of the permit application, this Court will not overturn IDEM's decision to issue the permit.
25. This Court finds that there is no genuine issue as to a material fact and that summary judgment is appropriate. Neither the Towns, Porter County, nor La Porte County have pointed to a statute or regulation that IDEM violated in issuing Great Lakes' permit, therefore Great Lakes' is entitled to judgment as a matter of law and IDEM's approval of Great Lakes' permit should be affirmed.

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ORDER

AND THE COURT, being duly advised, hereby **FINDS AND ORDERS** that the Towns, Porter County, and La Porte County have not shown that IDEM acted incorrectly in issuing Great Lakes' permit. **THE COURT ORDERS, ADJUDGES AND DECREES** that judgment is entered in favor of Great Lakes and against Petitioners and Intervenors. The Petitions for Review of the Town of Pines, the Town of Beverly Shores, and the Porter County Board of Commissioners, Board President Robert P. Harper, Board Vice President John A Evans and Board Secretary Carole M. Knoblock is therefore **DISMISSED**. The Motion to Intervene of La Porte County is therefore **DISMISSED**. All further proceedings before the Office of Environmental Adjudication are hereby **VACATED**.

You are further notified that pursuant to provisions of IND. CODE § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 12th day of September, 2006 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge